UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

AMEX CARD SERVICES COMPANY, a subsidiary of AMERICAN EXPRESS TRAVEL RELATED SERVICES COMPANY, INC., a subsidiary of AMERICAN EXPRESS COMPANY Respondent, and ERANDI ACEVEDO, JENNIFER FLYNN, and JONATHAN LONGNECKER, Individuals Charging Party.	)	Case No. 28-CA-123865

BRIEF OF RESPONDENT
AMEX CARD SERVICES COMPANY, a subsidiary of AMERICAN EXPRESS TRAVEL RELATED SERVICES COMPANY, INC, a subsidiary of
AMERICAN EXPRESS COMPANY

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STATUTES

I. INTRODUCTION

Pursuant to a Joint Motion and Stipulation of Facts, Counsel for the General Counsel ("General Counsel") alleges that the Employment Arbitration Policy ("EAP") of Amex Card Services Company ("Respondent") violates the National Labor Relations Act ("NLRA" or the "Act") under the theory articulated in *D.R. Horton*, 357 NLRB No. 184 (2012), *enf. denied D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013), *reh'g denied* (5th Cir. Apr. 17, 2014); and *Murphy Oil USA, Inc.*, 361 NLRB No. 72, slip op. (Oct. 28, 2014). The General Counsel's theory is that because the EAP contains a class/collective action waiver – i.e., all employment-related claims within the scope of the EAP must be submitted to arbitration on an individual basis – the EAP interferes with the Charging Parties' and other employees' rights to engage in concerted activity protected by Section 7 of the Act.

The *D.R. Horton* theory advanced by the General Counsel should be rejected for several reasons. First, the Board's decisions in *D.R. Horton* and *Murphy Oil* were wrongly decided and based on false legal propositions that dozens of courts have rejected, including the Circuit Courts of Appeals in the Second, Fifth, Eighth and Ninth Circuits (where this case arises) – which amounts to *every* Circuit Court of Appeals that has considered the issue. Indeed, the Fifth Circuit heard the direct appeal in *D.R. Horton* and rejected the very same arguments on which the General Counsel relies in this case. Even ignoring the substantial legal precedent, the Board should reject its previous decisions in *D.R. Horton* and *Murphy Oil* because those decisions (1) failed to apply appropriate deference to the Federal Arbitration Act ("FAA") and Supreme Court authority holding that mandatory arbitration agreements with class/collective action waivers are enforceable under the FAA; (2) incorrectly held that there is a right under Section 7 to litigate claims on a class or collective action basis; (3) failed to recognize that arbitration agreements do

not seek to regulate or affect core Section 7 rights; and (4) were based on a flawed interpretation of a statute, the Norris-LaGuardia Act ("NLGA"), that the Board has no authority to interpret or enforce.

Second, if the Board adheres to its position in *D.R. Horton* and *Murphy Oil* despite the many other federal court decisions rejecting the Board's position, the EAP at issue in this case is different from the mandatory arbitration agreements at issue in *D.R. Horton* and *Murphy Oil* because the EAP explicitly allows employees to file charges with the Board. This is an important distinction that removes the EAP from the "small percentage" of arbitration agreements encompassed by *D.R. Horton*, 357 NLRB No. 184, slip op. at 12.

Third, the core allegation of the Complaint, that the EAP violates the Act because it contains a class/collective action waiver, is time-barred under Section 10(b) of the Act. As the parties stipulated, the Charging Parties entered into the EAP on or before September 17, 2012. The charge was filed on May 6, 2014, well after the Section 10(b) period expired. To the extent that the Complaint in this case and any potential remedies rest on evidence that the EAP is unlawful because it was entered into by the Charging Parties as a condition of their employment, that allegation is time-barred.

For all of these reasons, Respondent respectfully submits that the Complaint should be dismissed in its entirety.

II. STATEMENT OF FACTS[1]

A. Respondent and the Charging Parties.

The Respondent is a credit card services company incorporated in the State of Delaware. Stip. ¶ 5(c). The Charging Parties began working for Respondent in Respondent's call center at

[1] References to the parties' Joint Motion and Stipulation of Facts ("Stipulation") will appear as "Stip. __." References to the joint exhibits attached to the Stipulation of Facts will appear as "Stip. Ex. __."

its Phoenix Facility on the following dates: Ms. Acevedo – June 18, 2012, Ms. Flynn – September 4, 2012, and Mr. Longnecker – September 17, 2012. Stip. ¶ 5(g). The Charging Parties signed Respondent's EAP on their respective hire dates. Stip. ¶ 5(i)(3); Joint Ex. 3.

B. The Employment Arbitration Policy

The EAP is a dispute resolution procedure providing for arbitration of, *inter alia*, employment-related claims which "arise out of or relate to an individual's application for employment, employment with the Company or separation from the Company." Joint Ex. 3. The EAP provides that all "covered claims" will be resolved only by an arbitrator through final and binding arbitration and states that there will be "no right or authority for any claims to be arbitrated on a class or collective basis." *Id*.

The EAP defines "covered claims" to include discrimination or harassment claims, failure to pay wages, bonuses or other compensation, wrongful, retaliatory and/or constructive discharge, claims under Title VII, the Fair Labor Standards Act and the Americans with Disabilities Act. *Id.*

The EAP also defines claims that are not covered. The EAP's "Claims Not Covered," explicitly permits employees to file charges with the Board. Specifically, the EAP provides that:

> **Claims Not Covered**
>
> Claims <u>not</u> subject to arbitration under this Policy are as follows:
>
> . . .
>
> 4. any claim under the National Labor Relations Act.

Id.

C. The Federal Court Litigation

After the Charging Parties' employment with Respondent ended, the Charging Parties filed a class action lawsuit against Respondent in the United States District Court of the District of Arizona in Case Number CV-14-00069-PHX, alleging violations of the Fair Labor Standards

Act. Stip. ¶ 5(k); Joint Ex. 4. On February 27, 2014, Respondent moved to compel the Charging Parties to arbitrate their claims pursuant to the terms of the EAP. Stip. ¶ 5(k); Joint Ex. 4. On March 6, 2014, the Charging Parties filed the charge that forms the basis of the Complaint in this case. Stip. ¶ 5(a); Joint Ex. 1(a) and 1(b). On May 28, 2014, the Respondent's motion was granted, with the Court specifically rejecting the Board's analysis in *Horton*. Stip. ¶ 5(l); Joint Ex. 5.

III. ARGUMENT

A. *D.R. Horton* and *Murphy Oil* Are Incorrect as a Matter of Law.

The Board should refuse to follow its decisions and logic in *D.R. Horton* and *Murphy Oil* because in those cases the Board failed to properly accommodate the NLRA to the FAA. The Supreme Court has made clear that arbitration agreements with class/collective action waivers are enforceable under the FAA, unless another statute contains a congressional command to the contrary. The NLRA contains no such command. *D.R. Horton*, 737 F.3d at 361 ("neither the NLRA's statutory text nor its legislative history contains a congressional command against application of the FAA"). The Board's decision in these cases also rests on a flawed interpretation of the NLGA, a statute that the Board has no authority to interpret or enforce.

1. The Board Should Refuse to Follow the Board's Positions in *D.R. Horton* and *Murphy Oil*

D.R. Horton was wrongly decided and has been rejected by all of the courts of appeals – including the Fifth, Eighth and Ninth Circuits – and substantially all of the state and federal district courts that have considered the issue. *See, e.g., Am. Express Co. v. Italian Colors Res.*, 133 S. Ct. 2304, 2312 (2013); *D.R. Horton*, 737 F.3d at 344; *Raniere v. Citigroup, Inc.*, 533 F. App'x 11 (2d Cir. 2013) (summary order); *Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2d Cir. 2013); *Owen v. Bristol Care*, 702 F.3d 1050 (8th Cir. 2013); *Morris v. Ernst & Young, LLP*,

No. C-12-4964, 2013 WL 3460052, at *10 (N.D. Cal. July 9, 2013); *Cunningham v. Leslie's Poolmart, Inc.*, No. 13-2122, 2013 WL 3233211, at *12 n.11 (C.D. Cal. June 25, 2013); *Dixon v. NBCUniversal Media, LLC*, No. 12 7646, -- F. Supp. 2d --, 2013 WL 2355521, at *9 n.11 (S.D.N.Y. May 28, 2013); *Birdsong v. AT&T Corp.*, No. 12-6175, 2013 WL 1120783, at *6 n.4 (N.D. Cal. Mar. 18, 2013); *Ryan v. JPMorgan Chase & Co.*, -- F. Supp. 2d --, No. 12--04844, 2013 WL 646388, at *6 (S.D.N.Y. Feb. 21, 2013); *Noffsinger-Harrison v. LP Spring City, LLC*, No. 12-161, 2013 WL 499210, at *5-6 (E.D. Tenn. Feb. 7, 2013); *Miguel v. JPMorgan Chase Bank*, No. 12-3308, 2013 WL 452418 (C.D. Cal. Feb. 5, 2013); *Torres v. United Healthcare Servs., Inc.*, -- F. Supp. 2d ---, No. 12--923, 2013 WL 387922 (E.D.N.Y. Feb. 1, 2013); *Long v. BDP Int'l, Inc.*, -- F. Supp. 2d ---, No. 12-1446, 2013 WL 245002, at *14 n.11 (S.D. Tex. Jan. 22, 2013); *Cohen v. UBS Fin. Servs., Inc.*, No. 2147, 2012 WL 6041634, at *4 (S.D.N.Y. Dec. 4, 2012); *Andrus v. D.R. Horton, Inc.*, No. 12-98, 2012 WL 5989646, at *8-9 (D. Nev. Nov. 5, 2012); *Johnson v. TruGreen LP*, No. 12-166, slip op. at *11-16 (W.D. Tex. Oct. 25, 2012); *Carey v. 24 Hour Fitness USA, Inc.*, 2012 WL 4754726, at *2 (S.D. Tex. Oct. 4, 2012); *Tenet Healthsystem Phila., Inc. v. Rooney*, No. 12-58, 2012 WL 3550496, at *4 (E.D. Pa. Aug. 17, 2012); *Truly Nolen of Am. v. Superior Court*, No. D060519, 2012 WL 3222211, at *21 (Cal. App. 4 Dist. Aug. 9, 2012); *Delock v. Securitas Sec. Servs. USA, Inc.*, 883 F. Supp. 2d 784, 789-90 (D. Ark. 2012); *Luchini v. Carmax, Inc.*, No. 12-0417, 2012 WL 2995483, at *7 (E.D. Cal. July 23, 2012); *Spears v. Mid-Am. Waffles, Inc.*, No. 11-2273, 2012 WL 2568157, at *2 (D. Kan. July 2, 2012); *De Oliverira v. Citigroup NA, Inc.*, No. 12-251-T-26TGW, 2012 WL 1831230, at* 2 (M.D. Fla. May 18, 2012); *Coleman v. Jenny Craig, Inc.*, No. 11-1301, 2012 WL 3140299, at *3-4 (S.D. Cal. May 15, 2012); *Morvant v. P.F. Chang's China Bistro, Inc.*, 870 F. Supp. 2d 831, 842-45 (N.D. Cal. 2012); *Brown v. Trueblue, Inc.*, No. 10-0514, 2012 WL 1268644 (M.D.

Pa. Apr. 16, 2012); *Jasso v. Money Mart Express, Inc*., 879 F. Supp. 2d 1038, 1049 (N.D. Cal. 2012); *Johnmohammadi v. Bloomingdales*, No. 11-6434, Dkt. No. 38, slip op. at 2-3 (C.D. Cal. Feb. 23, 2012); *Palmer v. Convergys Corp*., No. 10-145 HL, 2012 WL 425256, at *3 (M.D. Ga. Feb. 9, 2012); *Sanders v. Swift Transp. Co. of Ariz., LLC*, 843 F. Supp. 2d 1033, 1036 n.1 (N.D. Cal. 2012); *LaVoice v. UBS Fin. Servs., Inc.*, No. 11-2308, 2012 WL 124590, at *6 (S.D.N.Y. Jan. 13, 2012); *Brown v. Superior Court*, No. H037271, 157 Cal. Rptr. 3d 779 (Cal. Ct. App. 6th Dist. 2013); *Outland v. Macy's Dep't Stores, Inc*., No. A133589, 2013 WL 164419, at *4-5 (Cal. Ct. App. Jan. 16, 2013); *Papudesi v. Northrop Grumman Corp.*, No. B235730, 2012 WL 5987550, at *8 (Cal. Ct. App. Nov. 29, 2012); *Nelsen v. Legacy Partners Residential, Inc*., 207 Cal. App. 4th 1115, 1132-33, 144 Cal. Rptr. 3d 198, 213 (Cal. Ct. App. July 18, 2012).

In fact, the Fifth Circuit considered the arguments advanced by the General Counsel in the instant matter and rejected all of them. In doing so, the Fifth Circuit rejected the three central propositions of *D.R. Horton* and *Murphy Oil*: (1) that the right to pursue class or collective action litigation is a substantive right; (2) that the Board's decision does not conflict with the Supreme Court's recent precedent holding that arbitration agreements with class and collective action waivers are lawful and enforceable under the FAA; and (3) that the Section 7 right to engage in concerted activity trumps the FAA's liberal policy favoring arbitration.

The Fifth Circuit held that, in accordance with decades of Supreme Court precedent, the right to participate in class and collective actions is not a substantive right, but rather a procedural right that can be waived. *D.R. Horton*, 737 F.3d at 357. The court rejected the argument that the NLRA is sui generis in transforming this procedural right into a substantive one. *Id*.

Second, the Fifth Circuit rejected the argument that an arbitration agreement with a class

and collective action waiver may be invalidated under the FAA's savings clause because such a waiver violates the NLRA. In making this argument, the Board attempted to distinguish the Supreme Court's decision in *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011), which held that a California statute prohibiting class action waivers in arbitration agreements did not fall within the FAA's savings clause. The Board attempted to distinguish *Concepcion* by arguing that *D.R. Horton* does not disfavor arbitration because it only requires that employees have access to class or collective action proceedings, whether in a judicial or arbitral forum. The Fifth Circuit rejected this argument because, like the statute in *Concepcion*, the Board's interpretation of the NLRA in *D.R. Horton* disfavors arbitration. 737 F.3d at 359-60. As the Supreme Court held in *Concepcion*, requiring the availability of class or collective actions "interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Id.* at 359 (citing *Concepcion*, 131 S. Ct. at 1748). Therefore, the FAA's savings clause does not apply because "[r]equiring a class mechanism is an actual impediment to arbitration and violates the FAA." *Id.* at 359-60.

Third, the Fifth Circuit held that the NLRA does not contain any congressional command that overrides the FAA. *Id.* at 359-61. The Fifth Circuit reviewed the text, legislative history, and purpose of the NLRA for any contrary congressional command and found none. *Id.* There is no inherent conflict between the FAA and the NLRA because, as the court observed, arbitration is a "central pillar of Federal labor relations policy and in many different contexts the Board defers to the arbitration process both before and after the arbitrator issues an award." *Id.* at 361. Nor can a conflict be found because class and collective actions provide employees with greater bargaining power. "Mere inequality in bargaining power . . . is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context." *Id.* (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33 (1991)).

Accordingly, the Fifth Circuit held that the NLRA does not override the FAA's strong federal policy favoring the enforcement of arbitration agreements. The Fifth Circuit's decision is consistent with the many other federal and state court decisions rejecting *D.R. Horton*, including the Second, Eighth, and Ninth Circuits as well as the decision of the District of Arizona in analyzing the specific agreement in this case. *See* Stip. ¶ 5(l); Joint Ex. 5; *Richards v. Ernst & Young, LLP*, 744 F.3d 1072, (9th Cir. 2013); *Raniere*, 533 F. App'x at 11 (summary order); *Sutherland*, 726 F.3d at 290; *Owen*, 702 F.3d at 1050.

The wholesale rejection of the Board's reasoning in these cases by almost every court to consider the issues demonstrates that the Board has overstepped its authority in attempting to outlaw such mandatory arbitration agreements, which are intended to govern the resolution of *non-NLRA* claims. The Board overstepped its authority in several fundamental ways. First, the Board failed to apply appropriate deference to Supreme Court authority holding that mandatory arbitration agreements with class/collective action waivers are enforceable under the FAA. Second, the Board's attempts to avoid or distinguish the controlling Supreme Court precedent on this issue are unpersuasive. Third, the Board failed to recognize that these types of arbitration agreements do not seek to regulate or affect core Section 7 rights (i.e., the rights to organize and bargain collectively), but rather seek to resolve claims arising under other federal and state laws that have their own regulatory and enforcement mechanisms. Fourth, there is no right under Section 7 to litigate these non-NLRA claims on a class or collective action basis. Fifth, the Board's decision rests on a flawed interpretation of a statute, the NLGA, that the Board has no authority to interpret or enforce.

(a) The NLRA must yield to the FAA and the strong federal policy favoring arbitration of employment disputes in accordance with the terms of the parties' arbitration agreement.

The Board in *D.R. Horton* failed to give appropriate deference to the FAA and the strong federal policy favoring arbitration of employment disputes. The Board acknowledged that when there is a conflict between the policies of the NLRA and another federal statute, such as the

FAA, the Board must undertake a "careful accommodation" of the two statutes. *D.R. Horton*, 357 NLRB No. 184, slip op. at 8 (citing *S. Steamship Co. v. NLRB*, 316 U.S. 31, 47 (1942)).

In the case of the FAA, the Supreme Court has made it abundantly clear how the FAA and another federal statute are to be accommodated. The FAA requires enforcement of arbitration agreements according to their terms unless the NLRA contains a clear "congressional command" to the contrary. *Italian Colors Rest.*, 133 S. Ct. at 2304 (citing *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012)); *D.R. Horton*, 737 F.3d at 360. Despite the absence of any such command in the NLRA, the Board found that, to the extent the FAA conflicts with the NLRA, "the FAA would have to yield." *D.R. Horton*, 357 NLRB No. 184, slip op. at 12. Thus, *D.R. Horton* clearly conflicts with the Supreme Court's unequivocal directive that arbitration agreements should be enforced under the FAA in the absence of clear statutory language requiring the FAA to yield.

The FAA provides that an arbitration agreement "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Enacted in 1925 to combat the "judicial hostility to arbitration agreements," the FAA "place[s] arbitration agreements upon the same footing as other contracts," and "incorporate[s] a liberal federal policy favoring arbitration agreements." *Gilmer*, 500 U.S. at 24-25 (citations omitted).

The courts interpreting the FAA, including the Supreme Court, have concluded that arbitration agreements are to be enforced under the FAA "even if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator." *Id.* at 32 (internal citations omitted). The Supreme Court reiterated in *Italian Colors*, 133 S. Ct. at 2309; *Concepcion*, 131 S. Ct. at 1740; and *CompuCredit Corp*, 132 S. Ct. at 669, that the FAA *requires*

courts to enforce arbitration agreements according to their terms unless there is a clear congressional intent to override that mandate. That mandate is essential to preserving the strong federal policy favoring arbitration, a policy that is difficult to overstate.

In its recent decision in *CompuCredit*, the Supreme Court reaffirmed that "even when the claims at issue are federal statutory claims, unless the FAA's mandate has been overridden by a contrary congressional command," the arbitration agreement is enforceable. 132 S. Ct. at 669 (internal quotation marks and citations omitted). This "congressional command" must be clear. *Id.* Indeed, when Congress intends to restrict the use of arbitration, it must do so "with a clarity that far exceeds" the generic language regarding the creation of causes of action found in many statutes. *Id.* at 672. The Supreme Court has reinforced this time and again by finding that even "[s]tatutory references to having causes of action, filing in court, allowing suits, and even pursuing class actions are insufficient commands" to override the FAA's mandate. *See Delock*, 883 F. Supp. 2d at 789-90 (citing *CompuCredit*, 132 S. Ct. at 670-71).

Nothing in the NLRA's text or legislative history suggests that Congress intended to ban a class action waiver in an arbitration agreement. Section 7 provides that employees "shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. If language actually touching upon the adjudication of legal claims does not evince a sufficiently clear congressional command to override the FAA, it surely follows that the NLRA's more ambiguous definition of "concerted activities" for the "mutual aid or protection" of employees is insufficient. If Congress had intended to engraft onto *every* employment statute a right to

collective litigation, it could and "would have done so in a manner less obtuse." *CompuCredit*, 132 S. Ct. at 672.[2]

Section 7 says nothing about arbitration, federal court jurisdiction, the right to particular procedural options to resolve legal claims, or *anything* else about what goes on during judicial proceedings. *D.R. Horton*, 737 F.3d at 360 ("the [NLRA] does not even mention arbitration . . . [b]y comparison, statutory references to causes of actions, filing in court, or allowing suits all have been found insufficient to infer a congressional command against application of the FAA"); *Delock*, 883 F. Supp. 2d at 790 ("The NLRA's text contains no command that is contrary to enforcing the FAA's mandate."); *Morvant*, 870 F. Supp. 2d at 845 ("Congress did not expressly provide that it was overriding any provision in the FAA when it enacted the NLRA or the Norris-LaGuardia Act."); *Jasso*, 879 F. Supp. 2d at 1047 ("[T]here is no language in the NLRA . . . demonstrating that Congress intended the employee concerted action rights therein to override the mandate of the FAA."). When a statute "is silent on whether claims under [it] can proceed in an arbitral forum, the FAA requires the arbitration agreement to be enforced according to its terms." *CompuCredit*, 132 S. Ct. at 673.

Moreover, there is nothing in the legislative history of the NLRA to suggest antipathy toward individual arbitration. Section 1 of the NLRA declares that it is the policy of the United States to protect union organizing and collective bargaining "for the purpose of negotiating the terms and conditions of . . . employment." 29 U.S.C. § 151; *see also Allied Chem. & Alkali Workers of Am. v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 166 (1971) (the NLRA "is

[2] Congress does so when it wants to. *See CompuCredit*, 132 S. Ct. at 672. Section 26 of the Commodity Exchange Act expressly provides that "[n]o predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section." 7 U.S.C. § 26(n); *see also* 15 U.S.C. § 1226(a)(2) (providing that when a motor vehicle franchise contract includes an agreement to arbitrate a controversy arising out of or related to the contract, arbitration may be used only if *after* the controversy arises all parties consent in writing to use arbitration); *cf.* 12 U.S.C. § 5518 (authorizing the Bureau of Consumer Financial Protection, by regulation, to "prohibit or impose conditions or limitations" on the use of predispute arbitration agreements in contracts for consumer financial products or services).

concerned with the disruption to commerce that arises from interference with the *organization* and *collective-bargaining rights* of workers" (emphasis added)); *D.R. Horton*, 737 F.3d at 361 ("Neither the NLRA's statutory text nor its legislative history contains a congressional command against application of the FAA."). Nor does the legislative history of Section 7 have anything specific to say about employees' use of a particular procedural device to adjudicate a claim under an *unrelated, non-NLRA* statute. *See Owen,* 702 F.3d at 1053. In fact, as noted by the Fifth Circuit, the NLRA was enacted prior to the advent of the modern class action. *D.R. Horton,* 737 F.3d at 362.

In sum, the NLRA's text and legislative history do not contain *any* indication that Congress intended to override the FAA's mandate to enforce arbitration agreements according to their terms. At the very least, Congress did not do so with the "clarity" required for the NLRA to override the FAA. *CompuCredit*, 132 S. Ct. at 672; *D.R. Horton*, 737 F.3d at 360. Thus, it is no surprise that both the former Acting General Counsel and prior General Counsel of the Board have taken the position that an employee *can* permissibly waive the right to bring a class or collective action without implicating concerns under the NLRA.

In its arguments to the two-member panel in *D.R. Horton*, the Acting General Counsel stated: "An employer has the right to limit arbitration to individual claims—as long as it is clear that there will be no retaliation for concertedly challenging the agreement."[3] *D.R. Horton*, Acting Gen. Counsel's Reply Br. at 2.[4] In other words, as long as employees can join together to test the *validity* of an arbitration agreement, free from any retaliation, the NLRA does not prevent the *enforcement* of an otherwise valid agreement.

[3] In fact, because the General Counsel in *D.R. Horton* agreed on this issue, there was no actual controversy before the NLRB on this point. In resolving it anyway, the NLRB improperly rendered an advisory opinion. *Cf. United States v. Alpine Land & Reservoir Co.*, 887 F.2d 207, 214 (9th Cir. 1989) ("[C]ourts should not render advisory opinions upon issues which are not pressed before the court, precisely framed and necessary for decision.").
[4] *Available at* https://www.nlrb.gov/search/advanced/all/ (case: 12-CA-025764).

This position was consistent with the prior General Counsel, who stated that "no Section 7 right is violated when an employee possessed of an individual right to sue enters such a *Gilmer* agreement[5] as a condition of employment." GC Mem. 10-06, at 6 (June 16, 2010).[6] The prior General Counsel also found that "no issue cognizable under the NLRA is presented" if a mandatory arbitration agreement is drafted "to make clear that the employees' Section 7 rights to challenge those agreements through concerted activity are preserved." *Id.* at 2. Thus, an employer "may lawfully seek to have a class action complaint dismissed by the court on the ground that each purported class member is bound by his or her signing of a lawful *Gilmer* agreement/waiver." *Id.* at 7.

Consistent with the Board's long-standing position pre-*D.R. Horton*, the ALJ who initially heard *D.R. Horton* acknowledged "the absence . . . of direct Board precedent" and was "not aware of any Board decision holding that an arbitration clause cannot lawfully prevent class action lawsuits or joinder of arbitration claims." *D.R. Horton, Inc. & Michael Cuda*, No. 12-CA-25764, JD(ATL)-32-10, 2011 WL 11194, slip op. at 5 (Div. of Judges Jan. 3, 2011). Although the Board in *D.R. Horton* overruled the ALJ, it acknowledged the tension between its decision and the General Counsel's prior position. 357 NLRB No. 184, slip op. at 6.

This historical absence of any notion that the NLRA precludes a class action waiver in an arbitration agreement belies the Board's decision in *D.R. Horton*. Not only does the fact that a "right" to collective litigation that was articulated for the first time in 2012 by an invalid two-member panel severely undermine the idea that such a *nonwaivable* "right" exists at all, but also the fact that the federal courts, the Board's past General Counsels, and even the ALJ in *D.R.*

[5] The General Counsel described this term as an employee's agreement, "as a condition of employment, to channel his or her individual non-NLRA employment claims into a private arbitral forum for resolution." GC Mem. 10-06, at 1.

[6] *Available at* https://www.nlrb.gov/publications/general-counsel-memos (search: GC 10-06).

Horton reached the opposite conclusion and never identified *any* "contrary congressional command" in the NLRA for over seventy-five years means, at a *minimum*, that such a command has not been expressed by Congress with the "clarity" necessary to override the FAA's strong mandate. *CompuCredit*, 132 S. Ct. at 672. The Board in *Murphy Oil* did not address this issue, and at least one ALJ has concluded that, in light of the Supreme Court's subsequent precedent, the Board's position in *D.R. Horton* is not tenable. *Chesapeake Energy*, Case No. 14-CA-100530, slip op. at 9.

(b) The Board's attempts to avoid application of the FAA in *D.R. Horton* are contrary to clear Supreme Court precedent.

Recognizing the conflict between its decision and the Supreme Court's clear precedent that other statutes must yield to the FAA, the Board made several arguments as to why the FAA did not require enforcement of the arbitration agreement in *D.R. Horton*. First, the Board attempted to reconcile its decision with the FAA by citing the principle that an arbitration agreement may not require a party to "forego the substantive rights afforded by the statute." *D.R. Horton*, 357 NLRB No. 184, slip op. at 9 (citing *Gilmer*, 500 U.S. at 26); *see also Murphy Oil*, 361 NLRB No. 72, slip op. at 16. The Board reasoned that agreements to arbitrate non-NLRA claims on an individual basis fall within this exception because such agreements deprive individuals of their substantive rights under Section 7 of the NLRA. *See id.* The Board's conclusion is a misreading of the Supreme Court's decision in *Gilmer*. In *Gilmer*, the Supreme Court held that an arbitration agreement cannot require a party to "forego the substantive rights afforded by *the* statute" – meaning the statute a plaintiff brings suit under – not *any* federal statute. 500 U.S. at 26 (emphasis added). In *Gilmer*, the Supreme Court analyzed whether the Age Discrimination in Employment Act ("ADEA"), which formed the basis of the plaintiff's suit, precluded waiver of a

judicial forum. *Id.*[7] The Supreme Court was not required to seek out *any* federal statute that might confer an implicit substantive right upon the plaintiff that would be impaired if the arbitration agreement were enforced. Rather, the Court looked only to the ADEA itself to find a contrary congressional command. *Id.* Finding none, the Supreme Court "had no qualms enforcing a class waiver in an arbitration agreement even though the federal statute at issue, the [ADEA], expressly permitted collective actions." *Italian Colors*, 133 S. Ct. at 2311. Here, because the NLRA contains no congressional command that class or collective actions must be permitted, Supreme Court precedent requires that the EAP be enforced.

Second, the Board further misconstrued the law under the FAA when it held that "nothing in the text of the FAA suggests that an arbitration agreement that is inconsistent with the NLRA is nevertheless enforceable." *D.R. Horton*, 357 NLRB No. 184, slip op. at 11. The Board's reasoning is backwards. The FAA applies to all arbitration agreements; it need not specify that it applies to arbitration agreements that might be regulated by the NLRA. Rather, it is the NLRA that must contain language that expressly rules out the enforceability of bilateral arbitration agreements under the FAA. *See Gilmer*, 500 U.S. at 26 ("[H]aving made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." (citations omitted)). However, the NLRA contains no such language evincing a congressional intention to ban class action waivers.

Finally, recognizing that the *D.R. Horton* decision was inconsistent with Supreme Court precedent including *Concepcion*, the Board attempted to justify this departure by relying on a false premise. *Concepcion* concludes, without limitation, that "[a]rbitration is poorly suited to

[7] The Supreme Court noted in *Gilmer* that the plaintiff bore the burden to "show that Congress intended to preclude a waiver of a judicial forum for ADEA claims." 500 U.S. at 26.

the higher stakes of class litigation." 131 S. Ct. at 1752; *see also Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 599 U.S. 662, 684 (2010) (noting that "class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator"). The Board, however, erroneously reasoned that consumer cases can involve "tens of thousands of potential claimants," whereas the average single employer has twenty employees. *D.R. Horton*, 357 NLRB No. 184, slip op. at 11. According to the Board, this means "class-wide arbitration is thus far less cumbersome and more akin to an individual arbitration." *Id.* at 12. But employment class action suits regularly allege large classes of more than twenty members. *See, e.g., Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2547 (2011) (1.5 million members); *Smith v. T-Mobile USA Inc.*, 570 F.3d 1119, 1120 (9th Cir. 2009) (25,000 members). Therefore, the Board's speculation that class arbitration of employment disputes is "far less cumbersome" than individual claims is contrary to modern employment litigation and conflicts with *Concepcion*, which applies with equal force in the employment context as it does in consumer cases.

In sum, especially in light of the subsequent *CompuCredit* and *Italian Colors* decisions, the Board should have recognized that *D.R. Horton* runs afoul of Supreme Court precedent. The Board's attempts to avoid application of the FAA to arbitration agreements covered by the NLRA are strained and unpersuasive where, as here, the "contrary congressional command" test is applied. The NLRA does not contain such a command, and so it must yield to the FAA.

(c) Mandatory arbitration agreements that seek to resolve non-NLRA claims do not affect core Section 7 rights and therefore must yield to other interests.

Section 7 rights are not absolute. In both *D.R. Horton* and *Murphy Oil*, the Board failed to recognize that Section 7 rights fall on a spectrum and must be balanced against other statutory and common law rights. *See Hudgens v. NLRB*, 424 U.S. 507, 521 (1976) (stating that whether

Section 7 rights must give way to other legal rights, such as property rights, "largely depend[s] upon the content and the context of the [Section] 7 rights being asserted"); *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 144 (2002) ("we have accordingly never deferred to the Board's remedial preferences where such preferences potentially trench upon federal statutes and policies unrelated to the NLRA"). The FAA's "liberal federal policy" favoring arbitration agreements is precisely the type of interest that Section 7 rights must be balanced against. *Gilmer*, 500 U.S. at 24-25 (internal citations omitted). Because the Section 7 rights found in *D.R. Horton* and *Murphy Oil* are far from the core rights protected by the NLRA, they must yield to the FAA's clear mandate.

The spectrum of Section 7 rights becomes weaker the farther the purported activity falls from the NLRA's core concerns, to wit, organizing and collective bargaining. The Board must "tak[e] account of the relative strength of the Section 7 right" in a given case before determining that the NLRA is predominant. *Jean Country*, 291 NLRB 11, 18 (1988). When the Section 7 activity does not directly relate to employee organizing or collective bargaining, other rights and interests must be given greater weight. *See, e.g., United Food & Commercial Workers, Local No. 880 v. NLRB*, 74 F.3d 292, 294 (D.C. Cir. 1996) ("*Babcock* and its progeny indicate that . . . the interest of nonemployees in organizing an employer's employees is stronger than the interest of nonemployees engaged in protest or boycott activities . . . "); *NLRB v. Great Scot, Inc.*, 39 F.3d 678, 682 (6th Cir. 1994) ("Non-employee area standards picketing is even farther removed from the core concerns of Section 7 . . . their picketing was not even ostensibly aimed at organization . . . [which] warrants even less protection than non-employee organizational activity.").

Whether an employment law claim is litigated on a class or collective basis has nothing to do with organizing or bargaining collectively under the NLRA. Thus, the Section 7 right identified in *D.R. Horton* and *Murphy Oil* falls on the dimmest end of the spectrum, if even on the spectrum at all. Courts that have considered, and rejected, *D.R. Horton* have reached this very conclusion. *See, e.g.*, *D.R. Horton*, 737 F.3d at 357 ("[t]he use of class action procedures, though, is not a substantive right"); *Nelsen v. Legacy Partners Residential, Inc.*, No. A132927, slip op. at 19 (Cal. Ct. App. July 18, 2012) ("[The Board] cites no prior legislative expression, or judicial or administrative precedent suggesting class action litigation constitutes 'concerted activity for the purpose of . . . other mutual aid or protection.'").

For this reason, arbitration agreements with class/collective action waivers for non-NLRA claims do not constitute agreements that "purport to restrict Section 7 rights" as the Board found in *D.R. Horton*. 357 NLRB No. 184, slip op. at 4. The cases cited by the Board in *D.R. Horton* and *Murphy Oil* all involved individual employment agreements that purported to restrict core Section 7 activity – the right to organize and engage in collective bargaining. For instance, the individual employment contracts at issue in *National Licorice Co. v. NLRB*, 309 U.S. 350 (1940), were "procured through the mediation of a company-dominated labor organization" and were a means of displacing a legitimate union representative. *Id.* at 360. Furthermore, in those individual agreements, each employee agreed not to "demand a closed shop or a signed agreement by his employer with any Union." *Id.* The Supreme Court held that these individual agreements "were the fruits of unfair labor practices, stipulated for the renunciation by the employees of rights guaranteed by the Act, and were a continuing means of thwarting the policy of the Act." *Id.* at 361.

Similarly, the individual agreements at issue in *J. H. Stone & Sons*, 33 NLRB 1014 (1941), another case that the Board heavily relied upon in *D.R. Horton*, clearly interfered with employees' core Section 7 rights. The Board in *J. H. Stone* found that these individual agreements "were the fruit of the respondents' interference, restraint, and coercion and *had the purpose of defeating unionization of their employees*." *Id.* at 1023 (emphasis added). In enforcing the Board's order in *J. H. Stone*, the Seventh Circuit noted that one of the stated purposes of these agreements was "to prevent strikes and labor troubles" and found that, through the agreement's arbitration provision, the employee "not only waived his right to collective bargaining but his right to strike or otherwise protest on the failure to obtain redress through arbitration." *NLRB v. Stone*, 125 F.2d 752, 756 (7th Cir. 1942).

The Board in *D.R. Horton* and *Murphy Oil* also erroneously relies on the Supreme Court's decision in *J. I. Case Co. v. NLRB*, 321 U.S. 332 (1944), as authority for invalidating individual arbitration agreements. *D.R. Horton*, 357 NLRB No. 184, slip op. at 4-5; *Murphy Oil*, 361 NLRB No. 72, slip op. at 5. *J. I. Case* actually demonstrates the limits of the Board's authority to invalidate individual employment contracts. The Court held that the Board, "of course, has no power to adjudicate the validity or effect of such contracts except as to their effect on matters within its jurisdiction." *J. I. Case*, 321 U.S. at 340. Therefore, while the Board issued a broad cease-and-desist order with respect to the individual employment contracts in *J. I. Case*, the Supreme Court made clear that the Board's order would apply only to individual employment contracts that are "utilized to forestall collective bargaining and deter self-organization" and to prohibit the employer from entering into new contracts "under circumstances in which similar infringement of the collective bargaining process *would be a probable consequence*." *Id.* (emphasis added). Thus, *J. I. Case* can be read only to authorize the

Board to invalidate individual employment contracts that would have a "probable consequence" of interfering with core Section 7 rights – namely, the rights to organize and bargain collectively.

The individual contracts in *National Licorice*, *J. H. Stone*, *J.I. Case* and other cases cited by the Board in *D.R. Horton* and *Murphy Oil* in no way resemble the EAP or similar agreements to arbitrate non-NLRA claims on an individual basis. There was no finding in this case or in *D.R. Horton* that an agreement to arbitrate non-NLRA claims on an individual basis would have a "probable consequence" of thwarting union organizing, defeating unionization, interfering with the collective bargaining process, or preventing strikes and labor troubles. There is no evidence that the EAP was, as in *National Licorice*, negotiated through a company-dominated union or as part of an effort to defeat a strike or union-organizing campaign. There is no evidence that the EAP has *anything* to do with the right to organize and bargain collectively under the NLRA. Instead, the EAP is an agreement designed to resolve *non-NLRA* claims arising under other federal and state laws, which have their own regulatory and enforcement mechanisms, including class enforcement. Congress has not given the Board the power to police employment agreements that have nothing to do with the right to organize or bargain collectively under the Act, especially when balanced against other specific federal laws regulating such agreements, such as the FAA.

The Board in *D.R. Horton* impermissibly expanded the NLRA to confer procedural rights that do not otherwise exist under these laws. The Board has no authority to invoke Section 7 to regulate how claims will be resolved under other procedural rules and statutes.

(d) There is no Section 7 right to litigate non-NLRA claims on a class or collective action basis.

The Board's findings in *D.R. Horton* and *Murphy Oil* are an unprecedented expansion of the principle that Section 7's mutual aid or protection clause "protects employees from

retaliation by their employers when they seek to improve working conditions through resort to administrative and judicial forums." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565-66 (1978). Even if Section 7 protects employees from retaliation when they file a claim on a class or concerted basis, it does not mean that the entire course of the litigation is also governed by Section 7. The NLRA does not displace the Federal Rules of Civil Procedure and dictate that every legal claim that is for "mutual aid or protection" must therefore be litigated as a class or collective action. Indeed, the Board in *D.R. Horton* acknowledged that "there is no Section 7 right to class certification." *D.R. Horton*, 357 NLRB No. 184, slip op. at 10; *see also Murphy Oil*, 361 NLRB No. 72, slip op. at 14, 17. When a class or collective action is filed, the employees still must prove all of the requirements for class certification and employers are "free to assert any and all arguments against certification." *D.R. Horton*, 357 NLRB No. 184, slip op. at 10, n. 24. The only Section 7 right found by the Board is the "opportunity to pursue without employer coercion, restraint or interference such claims of a class or collective nature as may be available to them under Federal, State or local law." *Id.*; *see also Murphy Oil*, 361 NLRB No. 72, slip op. at 17.

The EAP does not contain any threat of "coercion, restraint or interference" if an employee or group of employees files a class or collective action in court. This distinguishes the EAP from the cases cited in *D.R. Horton* and *Murphy Oil*, which involve situations where employees are *disciplined or discharged* merely for asserting common legal claims or jointly selecting a common representative to present such claims to their employer. *See D.R. Horton*, 357 NLRB No. 184, slip op. at 2 (citing *Spandsco Oil & Royalty Co.*, 42 NLRB 942, 948-49 (1942) (finding that three employees who filed an FLSA suit for overtime pay were engaged in protected, concerted activity), and *Salt River Valley Water Users Ass'n*, 99 NLRB 849, 853-54 (1952), *modified by* 206 F.2d 325 (9th Cir. 1953) (finding that employees who circulated a

petition to have an employee designated as a representative for an FLSA claim were engaged in activity protected under Section 7)); *Murphy Oil*, 361 NLRB No. 72, slip op at 5, n.20, 21, 23-25 (citing *Spandsco Oil*, 42 NLRB at 948-49 (same); *Salt River Valley Water Users Ass'n*, 99 NLRB at 853-54 (same). There is no evidence that the claims in these cases were actually litigated as class or collective actions. In *Spandsco Oil*, the case was dismissed, with prejudice, four months after it was filed. In *Salt River Valley Water Users Ass'n*, it does not appear that the claim was ever filed in court. Precedent holding that employees may not be fired merely for attempting to file, or unsuccessfully filing, a claim in court cannot be read to also hold that the employees have a Section 7 right to actually litigate that claim as a class or collective action; such a reading is not supported by the facts of those cases.

Further, *D.R. Horton* mistakenly equates the right to discuss employment claims with other employees, pool resources to hire an attorney, and seek advice and litigation support from a union – rights and activities that can be protected by Section 7 depending on the circumstances – as legally equivalent to having a single forum adjudicate common legal claims under other statutes and rules of civil procedure. *D.R. Horton*, 357 NLRB No. 184, slip op. at 6. Even if the activities mentioned above leading up to the filing of a claim in court are considered protected by Section 7, it does not follow that Section 7 dictates *the process* by which the employees' claims are ultimately adjudicated, whether in a single or collective forum.

Courts that have considered *D.R. Horton* have rejected the proposition that the NLRA creates a nonwaivable right to adjudicate, in a single forum, common claims arising under other laws and rules of civil procedure. After all, the Board has no expertise in the process or rules by which individual claimants may seek to have one court address their claims at the same time. *See, e.g.*, *Nelsen*, 144 Cal. Rptr. 3d at 213 ("[T]he interplay of class action litigation, the FAA,

and section 7 of the NLRA falls well outside the Board's core expertise in collective bargaining and unfair labor practices.").

The Board must recognize that the Supreme Court has repeatedly deemed a class or collective action as principally procedural, and therefore waivable, option rather than a substantive right protected by the NLRA or any other law. The Supreme Court reiterated in *Italian Colors* that Federal Rule of Civil Procedure 23, which governs class actions, "was designed to allow an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." 133 S. Ct. at 2309. Most importantly, *Gilmer* itself found that a class or collective action procedure is not a guaranteed right, but rather a waivable option. 500 U.S. at 32 (arbitration agreement should be enforced "even if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator"). The Supreme Court reiterated this holding in *Italian Colors*. 133 S. Ct. at 2312.

Consequently, an arbitration procedure, like the EAP, which seeks only to regulate *how* a claim will be litigated or arbitrated, but contains no threat of discipline or discharge if an employee refuses to acknowledge or challenges that procedure, does not implicate the NLRA because it fully permits the employee to pursue his or her litigation "without employer coercion, restraint or interference." *D.R. Horton*, 357 NLRB No. 184, slip op. at 10 n.24. Employees retain the ability to join together to discuss and present their claim, as a group, in court. Whether a court decides to compel individual arbitration of that claim is a matter for the court to decide under the rules of civil procedure, the FAA, and the substantive law governing the claim at issue – not the NLRA, which does not regulate how the case is litigated or arbitrated.

(e) The Board has no statutory authority to interpret the NLGA, and even if it did, the NLGA does not prohibit enforcement of arbitration agreements that include class/collective action waivers.

The Board in *D.R. Horton* also erred in holding that the NLGA, and, by implication, the NLRA, partially repealed the FAA so that it does not apply to employment arbitration agreements containing class/collective action waivers. 737 NLRB at 362 n.10. The Board noted that the FAA was enacted in 1925 and predated both the NLGA and the NLRA. *D.R. Horton*, 357 NLRB No. 184, slip op. at 12. Therefore, if the FAA conflicts with either of those statutes, the Board in *D.R. Horton* reasoned that the FAA must have been repealed, either by the NLGA's provision repealing statutes in conflict with it or impliedly by the NLRA.

The Board in *D.R. Horton*, however, failed to account for the dates when the NLRA and the FAA were amended or reenacted. Those are the relevant dates for this analysis. *See Chi. & N. W. Ry. Co. v. United Transp. Union*, 402 U.S. 570, 582 n.18 (1971) (looking to reenactment date of the Railway Labor Act to determine that it post dated the NLGA and concluding that "[i]n the event of irreconcilable conflict" between the two statutes, the former would prevail). Congress reenacted the FAA in 1947, "twelve years after the NLRA and fifteen years after the passage of the Norris-LaGuardia Act." *Owen*, 702 F.3d at 1053. Thus, in the event of any conflict between these statutes, the FAA must prevail. Although in *Murphy Oil* the Board attempts to argue that the timing of the FAA's reenactment carries no significance because Congress did not "clearly" express an intent to override the NLRA, as the Eighth Circuit explained, "[t]he decision to reenact the FAA suggests that Congress intended its arbitration protections to remain intact even in light of the earlier passage of three major labor relations statutes." *Compare id. with Murphy Oil*, 361 NLRB No. 72, slip op. at 11.

In any event, the Board's reading of the NLGA is unreasonable and beyond the scope of its jurisdiction. *D.R. Horton*, 737 F.3d at 362 n.10 ("[i]t is undisputed that the NLGA is outside

the Board's interpretive ambit . . . [w]e also conclude that the Board's reasoning drawn from the NLGA is unpersuasive"). The NLGA is an anti-injunction statute. It deprives courts of authority to issue injunctions in labor disputes, except under certain specific exceptions. *D.R. Horton* was not an injunction proceeding and the NLGA has nothing to do with whether employees have an unwaivable Section 7 right to adjudicate class or collective action claims in court. Further, the NLGA can only be enforced by courts. The statute provides that "[n]o restraining order or temporary or permanent injunction shall be granted in a case involving or growing out of a labor dispute, except on the basis of findings of fact made and filed by the court in the record of the case prior to the issuance of such restraining order or injunction." 29 U.S.C. § 109. The NLGA specifically defines those contracts to which it applies (colloquially known as "yellow-dog" contracts) as limited to contracts not to join a union or to quit employment if one becomes a member of a union. NLGA § 3(a) & (b), 29 U.S.C. § 103(a) & (b). *See also Barrow Utils. & Elec.*, 308 NLRB 4, 11 n.5 (1992) (defining a yellow dog contract as "[a]ny promise by a statutory employee to refrain from union activity or to report the union activities of others").

D.R. Horton's and *Murphy Oil*'s characterization of the "right" to engage in class and collective legal actions as "the core substantive right protected by the NLRA" and "the foundation on which the Act and Federal labor policy rest," *D.R. Horton*, 357 NLRB No. 184, slip op. at 10; *see also Murphy Oil*, 361 NLRB No. 72, slip op. at 7, makes no sense given that when the original Wagner Act was passed in 1935, Rule 23, the FLSA, Title VII, the ADEA, and the many other statutes that give rise to modern employment law class and collective actions did not exist. *D.R. Horton*, 737 NLRB at 361-62 ("[o]f some importance is that the NLRA was enacted and reenacted prior to the advent in 1966 of modern class action practice").

In any event, the Supreme Court has found that the NLGA must accommodate the substantial changes in labor relations and the law since it was enacted. In *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235 (1970), the Court considered whether the NLGA prohibited a federal court from enjoining a strike in breach of a no-strike obligation under a collective bargaining agreement when that agreement provided for binding arbitration of the dispute that was the subject of the strike. The Court concluded that the NLGA "must be accommodated to the subsequently enacted" Labor Management Relations Act ("LMRA") "and the purposes of arbitration" as envisioned under the LMRA. *Id*. at 250. The Court noted that through the LMRA, Congress attached significant importance to arbitration as a means of settling labor disputes. *Id.* at 252.

The federal courts have, in several cases, rejected *D.R. Horton*'s analysis of the history of the NLGA, NLRA, and FAA. These courts concluded that Congress was silent on the NLGA's and the NLRA's intersection with the FAA and that no such preemptive provision may be read into federal labor law, particularly in light of the fact that the FAA was enacted in 1925 in response to widespread judicial hostility to arbitration agreements, while the NLRA was enacted later in 1935 and subsequently amended in 1947—providing Congress with two opportunities to express its command that the NLRA or the NLGA overrides the FAA. *See Morvant*, 870 F. Supp. 2d at 844; *Jasso*, 849 F. Supp. 2d at 1049 & n.3. Accordingly, of the three statutes at issue, the FAA is the most recently reenacted and Congress never spoke to the intersection of the FAA and the NLRA. If there is any "irreconcilable conflict" among them, the FAA must prevail.

For all of these reasons, *D.R. Horton* and *Murphy Oil* are wrongly decided. The Board has far exceeded its authority and administrative expertise under the NLRA and has been rejected by virtually every court that has considered it.

2. The EAP is Distinguishable from the Agreement at Issue in *D.R. Horton* and Thus Even If The Board Adheres To Its Position In *D.R. Horton*, The Board Should Not Find That The EAP Violates The Act.

If the merits of this case are reached, there are significant differences between the EAP at issue in this case and the arbitration agreements at issue in *D.R. Horton* and *Murphy Oil*. As noted previously, the Board in *D.R. Horton* emphasized the limits of its holding, stating that "[o]nly a small percentage of arbitration agreements are potentially implicated by the holding in this case." 357 NLRB No. 184, slip op. at 12. The EAP is not among the "small percentage" of arbitration agreements covered by *D.R. Horton*.

Unlike the mandatory arbitration agreement in *D.R. Horton* and *Murphy Oil*, the EAP specifically excludes claims arising under the NLRA and protects employees' rights to file charges with the Board. Therefore, employees may, individually or as a group, file a charge with the Board over their claim. The right to file a charge, in addition to pursuing a claim through arbitration, is a significant factor weighing in favor of the enforceability of the arbitration agreement. *See Gilmer*, 500 U.S. at 28 ("An individual ADEA claimant subject to an arbitration agreement will still be free to file a charge with the EEOC, even though the claimant is not able to institute a private judicial action.").

If the Board finds that the employees' claim has merit, the Board can prosecute the claim against the employer and seek a remedy on behalf of all affected employees. The Board's decision to pursue enforcement of covered claims on behalf of employees is an adequate substitute for class or collective action litigation brought by the employees. Therefore, by protecting the employees' right to file charges with the Board, the EAP does not foreclose the

pursuit of groupwide remedies. This is a significant difference from the agreements at issue in *D.R. Horton* and *Murphy Oil* and removes the EAP from the "small percentage of arbitration agreements" implicated by the Board's decision in that case.

B. The Complaint Is Barred by Section 10(b).

The allegation that the Respondent violated Section 8(a)(1) of the Act by the "maintenance and enforcement of its" EAP as a condition of employees' employment is supported only by evidence that Respondent required the Charging Parties to enter into the EAP as a condition of their employment. Therefore, the allegation that Respondent violated Section 8(a)(1) is barred by Section 10(b) of the Act because the Charging Parties signed the EAP more than six months prior to filing the charge. Section 10(b) states that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board." 29 U.S.C. § 160(b).

The Charging Parties entered into the EAP on or before September 17, 2012. They did not file the charge until March 6, 2014, more than eighteen months after entering into the EAP. Thus, the allegation that requiring the Charging Parties to execute the EAP was an unfair labor practice is barred by Section 10(b) of the Act.

Counsel for the General Counsel cannot avoid this Section 10(b) problem by arguing that the mere maintenance of the EAP constitutes a violation of the Act. Unlike an employer policy or work rule that is alleged to be facially unlawful so that its mere maintenance constitutes a violation of the Act, the theory of a violation with respect to the EAP depends on the circumstances in which the agreement was entered into. The General Counsel's theory of a violation is *not* that all arbitration agreements that contain a class or collective action waiver are facially unlawful. The holding of *D.R. Horton* is certainly not that broad:

> We emphasize the limits of our holding and its basis. Only a small percentage of arbitration agreements are potentially implicated by the holding in this case.

357 NLRB No. 184, slip op. at 12.

Given the limits of the Board's holding, the theory of a violation under *D.R. Horton* depends on the facts and circumstances at the time the EAP was entered into – i.e., whether an employee voluntarily entered into the EAP or was compelled to do so as a condition of employment.

In this sense, the timeliness of the charge with respect to Respondent's maintenance of the EAP is analogous to a collective bargaining agreement that is alleged to be unlawful based on the circumstances existing at the time the agreement was entered into. In *Local Lodge No. 1424 v. NLRB*, 362 U.S. 411 (1960), the Supreme Court held that "a finding of violation which is inescapably grounded on events predating the limitations period is directly at odds with the purposes of the § 10(b) proviso." *Id.* at 422. The allegation in that case was that a collective bargaining agreement containing a union security clause was unlawful because the union did not represent a majority of the employees in the bargaining unit at the time the agreement was entered into. There was no dispute as to that fact before the Supreme Court – the union did not challenge that it lacked majority status at that time. *Id.* at 412 n.1. The charge was filed more than six months after the agreement was entered into, and the complaint alleged that the continued enforcement of the agreement violated the Act. The Supreme Court held that this complaint was barred by Section 10(b), reasoning that:

> Where conduct occurring within the limitations period can be charged to be an unfair labor practice only through reliance on an earlier unfair labor practice . . . the use of the earlier unfair labor practice is not merely "evidentiary," since it does not simply lay bare a putative current unfair labor practice. Rather, it serves to cloak with illegality that which was otherwise lawful. And where a complaint based upon that earlier event is time-barred, to permit

> the event itself to be so used in effect results in reviving a legally defunct unfair labor practice.

Id. at 416-17.

In this case, the complaint alleges that Respondent violated the Act by maintaining the EAP. Under *D.R. Horton*, these allegations depend on the facts and circumstances at the time the EAP was entered into – i.e., whether the Charging Parties (and other employees) voluntarily entered into the EAP or were compelled to do so as a condition of their employment. Because the Charging Parties entered into the EAP outside the Section 10(b) period, the Complaint allegation with respect to Respondent's maintenance of the EAP is, as in *Local Lodge No. 1424*, an effort to revive a now "legally defunct unfair labor practice." *Id.* at 417. The Complaint should be dismissed on this basis.

IV. CONCLUSION

For the foregoing reasons, Respondent respectfully urges the Board to dismiss the Complaint in its entirety.

Date: May 20, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of May, 2015, a true and correct copy of the foregoing Brief was filed with the Board via the Board's electronic filing system, and served by electronic mail upon the following:

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